LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
MAY 27 1965
JOHN F. DAVIS, CLERK

No. 123.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

FEDERAL POWER COMMISSION,
Petitioner,

v.

UNION ELECTRIC COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

RESPONDENT'S PETITION FOR REHEARING.

ROBERT J. KEEFE,
ROBERT F. SCHLAFLY,
314 North Broadway,
St. Louis, Missouri 63102,
Counsel for Respondent,
Union Electric Company.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

	Page
Petition for Rehearing	1
Introductory Statement	1
I—The Constitutional Basis of the License Provisions	2
II—The Asserted Distinction between Hydroelectric Plants and Steam Plants	6
III—Unconstitutional Application of the Statute	7
Conclusion	8
Certificate of Counsel	8

TABLE OF CITATIONS.

Cases:

Ashwander v. Tennessee Valley Authority, 297 U. S. 288	5
Namekagon Hydro Co. v. Federal Power Commission, 216 F. 2d 509	3
Phillips v. Guy F. Atkinson Co., 313 U. S. 508	2
State of Iowa v. Federal Power Commission, 178 F. 2d 421	3
United States v. Appalachian Electric Power Co., 311 U. S. 377	4
United States v. Jin Fuey Moy, 241 U. S. 394	7
United States v. Rio Grande Dam & Irrigation Co., 174 U. S. 690	2

Statutes:

Federal Power Act [Federal Water Power Act of June 10, 1920 (41 Stat. 1963) as amended] including

amendments and additions by Title II of the Public Utility Act of August 26, 1935, c. 687, 49 Stat. 836; 16 U. S. C. 791a-825r 4
Section 6—16 U. S. C. 799 4
Section 10(e)—16 U. S. C. 803(e) 4
Section 14—16 U. S. C. 807 4
Section 23(b)—16 U. S. C. 817 ..... 2, 4, 7

No. 123.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

FEDERAL POWER COMMISSION,
Petitioner,

v.

UNION ELECTRIC COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

RESPONDENT'S PETITION FOR REHEARING.

Respondent Union Electric Company respectfully petitions the Court to grant a rehearing in this cause.

A basic postulate of the majority opinion is that "there are no constitutional doubts or barriers to the

FPC's interpretation" of Section 23(b) of the Act (Slip opinion, page 5). We respectfully submit, however, that that interpretation, as applied in the Court's decision, is subject to grave constitutional objections. To present the considerations upon which those objections are based is the purpose of this petition.

I.

It is recognized in the opinion that the jurisdiction of Congress over nonnavigable tributaries of river systems is limited to "supervisory power to preserve or improve downstream navigability or water commerce generally." (Slip opinion, p. 7—citing *United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690; *Phillips v. Guy F. Atkinson Co.*, 313 U. S. 508.) And the discussion proceeds on the assumption that the project in question (on a nonnavigable tributary) will have no effect upon downstream navigability (slip opinion, footnote 6, pp. 3-4). So it is clear that the result reached by the Court is not based upon the jurisdiction of Congress [referred to in Section 23(b) of the Act] over nonnavigable tributary streams. It is based upon the power over interstate commerce generally. (See particularly, statements at pages 7-8 of slip opinion.)[1]

---

[1] Referring to the clause "over which Congress has jurisdiction under its authority to regulate commerce," the opinion says:

> "This language merely designates those who must file a declaration of intention—all those who would locate a water power project on a nonnavigable stream within the jurisdiction of Congress are required to declare their intention so that the Commission may determine the necessity for a license. Congress then proceeds to invoke its full authority over commerce, without qualification, to define which of those projects on nonnavigable streams are required to be licensed. Respondent asserts that commerce must mean the same thing in both the filing and licensing requirements of § 23(b); because of the allusion to water commerce in the filing provision, the Commission's inquiry into the effect of the project on commerce must be limited to the source of Congress' power over the stream.' Nothing in the structure or syntax of § 23(b) com-

In view of that fundamental factor, the effect of the decision is to extend the commerce power—apart from the phase of that power relating to navigable waters—beyond constitutional limits.

It is true, of course, that projects generating electric energy for transmission in interstate commerce affect such commerce and, therefore, may be regulated by Congress in the exercise of its commerce power—as pointed out by the Court (slip opinion, pp. 4-5). That power, as demonstrated in the cases cited by the Court, justifies regulation of production to the extent that such regulation constitutes an appropriate means of regulating interstate commerce in the things to be produced. But it does not follow that the statutory provisions here in question can be justified under the power over commerce generally. For those provisions are not confined to "regulation" of production or a phase of it. They far exceed that field.

What is involved here is an absolute prohibition of production—and of the construction of a plant for production—except after applying for and obtaining a license of the kind which the Federal Power Commission is authorized to issue.[2]

---

pels this conclusion. Indeed, in describing in distinct terms the standard for who must file and what must be licensed, the more compelling inference is that Congress intended the inquiry into the project's effect on commerce to include, but not be limited to, effect on downstream navigability."

[2] In passing upon an application for a license the Commission may exercise discretion. For example, it may deny an application for a license if it determines that the proposed project would not be best adapted for beneficial public uses of the river, including recreational uses. *Namekagon Hydro Co. v. Federal Power Com'n* (7th Cir.), 216 F. 2d 509. And it has been judicially indicated that the Commission might refuse a license if it found the proposed project not economically feasible (because of an inadequate market for the power to be produced) or that the plan for financing the project was unsound. *State of Iowa v. Federal Power Com'n* (8th Cir.), 178 F. 2d 421.

That is the effect of § 23(b) of the Act. And the required license, as stated in that section, is a "license under the provisions of this Act."

Under the provisions of the Act, thus incorporated in the requirement of § 23(b), (1) the license is limited to a period of fifty years, § 6 of the Federal Power Act, 49 Stat. 841, 16 U. S. C. 799; (2) it is conditioned upon acceptance by the licensee, to be expressed in the license itself, of the terms and conditions of the Act and of conditions prescribed by the Commission in conformity with the Act—§ 6, 49 Stat. 841, 16 U. S. C. 799; (3) the licensee is required to pay an annual charge to be fixed by the Commission—§ 10(e), 49 Stat. 843, 16 U. S. C. 803(e); and (4) the United States is authorized, upon or after the expiration of the license period, "to take over and thereafter to maintain and operate" the licensed project—§ 14, 49 Stat. 844, 16 U. S. C. 807.

In those respects, as in some others, the restraints imposed by § 23(b) of the Act exceed what may be justified as within the general power to regulate whatever affects commerce. They are justifiable only with respect to projects which are subject to the plenary power of Congress over navigable waters as highways of commerce.

That is demonstrated by the decision of this Court in *United States v. Appalachian Electric Power Co.*, 311 U. S. 377 (cited at p. 11 of the opinion in this case). There the Court upheld the power of Congress to require a license for a project in a navigable river, solely because the project was subject to the plenary power of the Federal Government over navigable waters—particularly the power to prohibit construction in such waters.

> "Possessing this plenary power to exclude structures from navigable waters and dominion over flowage and its product, energy, the United States may

make the erection or maintenance of a structure in a navigable water dependent upon a license." 311 U. S. at p. 424.

And, referring to the contention that certain of the license provisions were without reasonable relationship to the constitutional objective, the Court said:

"Even if there were no such relationship the plenary power of Congress over navigable waters would empower it to deny the privilege of constructing an obstruction in those waters. It may likewise grant the privilege on terms."

311 U. S. at p. 427.

The provision (in § 14 of the Act) authorizing the United States to take over, maintain and operate the licensed project after the expiration of the license period, was sustained upon the ground that

"Since the United States might erect a structure in these waters itself, even one equipped for electrical generation, it may constitutionally acquire one already built."

311 U. S. at p. 428.

As a basis for that holding the Court cited its decision in *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288. There the project involved—Wilson Dam and the power plant connected with it in a navigable river—had been authorized "for the purposes of national defense and the improvement of navigation"; and the Court upheld the authority of the governmental agency to maintain and operate the project for those purposes (297 U. S. at p. 326).[3]

---

[3] While Congress might authorize construction of a federal project in the East Fork in the interests of navigation on the Black

The rationale of the decision in the *Appalachian* case upholding the license provisions, makes it clear that those provisions would be upheld also with respect to a project in a non-navigable tributary of a navigable stream, *if the project would affect downstream navigability.* The prime issue in a case involving non-navigable water, is whether or not there will be such an effect. That test has been uniformly applied in determining whether or not a matter in question may be regarded as within the power of Congress with respect to navigable waters.

In our case also, as we have noted, the Court has recognized that the jurisdiction of Congress over non-navigable tributary waters is limited to the "power to preserve or improve downstream navigability or water commerce generally" (slip opinion, p. 7). And, as also previously noted, the opinion proceeds on the assumption that there is no such effect in this case. Those two elements, we respectfully submit, eliminate the only possible basis upon which the license provisions might be held validly applicable in a case of this sort.

II:

In the last paragraph of the opinion (page 20) the Court upholds the Commission's distinction between hydroelectric plants and steam plants (with respect to the license requirement) on the basis that hydroelectric projects utilize water resources, particularly the power potential in the water, whereas steam plants do not.

That distinction, we submit, is not a tenable one in this case, in view of preceding parts of the opinion. We refer, here again, to the stated assumption that the project (on a nonnavigable stream) will have no effect upon navigable

---

River, it could not authorize a federal project, such as Taum Sauk, which would not "preserve or improve downstream navigability or water commerce generally."

waters, and to the proposition that the jurisdiction of Congress over non-navigable tributary streams is limited to measures for the preservation or improvement of downstream navigability or water commerce generally (slip opinion, p. 7). So, the Federal Government has no valid concern with the use of the water in the operation of this project. Nor does that use of water constitute the basis upon which the project is held subject to the licensing requirement. The determinative factor in that holding is the transmission of project energy in interstate commerce.

III.

In view of the factors dealt with under the two preceding divisions of this petition, we submit that the construction which the Court has placed upon § 23(b) of the statute would make it unconstitutional as applied to the owner of riparian rights on a non-navigable tributary stream. To prevent such an owner from using water of the stream in a manner having no effect upon downstream navigability—except after obtaining a license of the kind prescribed in the Federal Power Act and accepting all of the terms and conditions of the license (including those authorizing the Government to take over and operate the licensed project)—would deprive him of valuable property rights. For the reasons we have outlined, such a deprivation would exceed constitutional limitations.

In view of those considerations, the construction of § 23(b) which the Court has adopted should be re-examined in light of the rule that

> "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."
>
> United States v. Jin Fuey Moy, 241 U. S. 394, 401.

In order that the factors referred to in this petition may be more fully presented and that the issues may be reconsidered, this Petition for Rehearing is

Respectfully submitted,

ROBERT J. KEEFE,
ROBERT F. SCHLAFLY,
Counsel for Respondent, Union Electric Company.

May 26, 1965.

Certificate of Counsel.

I, Robert J. Keefe, one of counsel for Respondent Union Electric Company, certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

May 26, 1965.

Robert J. Keefe.